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No. 07-10441

# In The Supreme Court of the United States

JOHNNIE CORLEY,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... iii

ARGUMENT ..... 1

A. 18 U.S.C. § 3501(c) and the *McNabb-Mallory* rule required suppression of Mr. Corley's confessions ..... 1

1. Section 3501(c) retains the *McNabb-Mallory* rule outside the six-hour time limitation ..... 2

2. Reading § 3501 to make voluntariness the sole criterion for the admissibility of confessions renders subsection (c) unacceptably superfluous ..... 5

3. The government's rewriting of § 3501(c) to avoid surplusage fundamentally changes the subsection from a provision addressing the *McNabb-Mallory* rule to a putative voluntariness safe harbor ..... 6

B. The government's interpretation of § 3501(c) either is constitutionally doubtful, or renders the subsection redundant of the voluntariness requirement and therefore superfluous ..... 10

C. Federal Rule of Evidence 402 does not require admission of Mr. Corley's confessions ..... 11

TABLE OF CONTENTS – Continued

Page

1. Rule 402 preserves the *McNabb-Mallory* rule ..... 12
2. Rule 402 did not abolish the Court's supervisory power to exclude evidence ..... 16

D. The government fails to address the central elements of § 3501's legislative history ..... 19

E. The government's policy arguments do not provide any basis for disregarding the text of § 3501 and its legislative history ..... 24

CONCLUSION ..... 31

TABLE OF AUTHORITIES

Page

CASES

*Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979) ..... 2

*Dickerson v. United States*, 530 U.S. 428 (2000) ..... 6, 9

*Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005) ..... 19, 20, 23

*Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976) ..... 21

*Garcia v. United States*, 469 U.S. 70 (1984) ..... 23

*Green v. Bock Laundry Mach. Co.*, 490 U.S. 504 (1989) ..... 5

*Lamie v. Trustee*, 540 U.S. 526 (2004) ..... 5

*Mallory v. United States*, 354 U.S. 449 (1957) ..... *passim*

*McNabb v. United States*, 318 U.S. 332 (1943) ..... *passim*

*McNeil v. Wisconsin*, 501 U.S. 171 (1991) ..... 29, 30

*Miranda v. Arizona*, 384 U.S. 436 (1966) ..... *passim*

*Moran v. Burbine*, 475 U.S. 412 (1986) ..... 28

*O'Neal v. United States*, 411 F.2d 131 (5th Cir. 1969) ..... 28

*Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633 (1990) ..... 22

*Pettyjohn v. United States*, 419 F.2d 651 (D.C. Cir. 1969) ..... 28

*Pillsbury v. United Engineering Co.*, 342 U.S. 197 (1952) ..... 8

TABLE OF AUTHORITIES – Continued

Page

*Russello v. United States*, 464 U.S. 16 (1983).....8

*Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006).....29

*Steiner v. Mitchell*, 350 U.S. 247 (1956) .....23

*Tome v. United States*, 513 U.S. 150 (1995).....12

*United States v. Atlantic Research Corp.*, 127 S. Ct. 2331 (2007).....5, 6

*United States v. Barlow*, 693 F.2d 954 (6th Cir. 1982) .....28

*United States v. Caceres*, 440 U.S. 741 (1979).....18

*United States v. Colon*, 835 F.2d 27 (2d Cir. 1987) .....25

*United States v. Fullwood*, 86 F.3d 27 (2d Cir. 1996) .....25, 26

*United States v. Indian Boy X*, 565 F.2d 585 (9th Cir. 1977) .....28

*United States v. Jacobs*, 547 F.2d 772 (2d Cir. 1976), *cert. dismissed as improvidently granted*, 436 U.S. 31 (1978) .....18

*United States v. Payner*, 447 U.S. 727 (1980)....14, 18, 19

*United States v. Perez*, 733 F.2d 1026 (2d Cir. 1984) .....26

*United States v. Salamanca*, 990 F.2d 629 (D.C. Cir. 1993) .....28

*United States v. Wilson*, 838 F.2d 1081 (9th Cir. 1988) .....4

*Upshaw v. United States*, 335 U.S. 410 (1948).....9

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

18 U.S.C. § 3501 .....*passim*

18 U.S.C. § 5032 .....28

FEDERAL RULES

*Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183 (U.S. 1972) .....12, 17

Fed. R. Crim. P.

Rule 5(a) .....13, 16, 25, 26, 27

Rule 5(d) .....27

Fed. R. Evid.

Rule 402.....*passim*

Rule 402 Advisory Committee Notes

1972 Proposed Rule .....13, 16

1974 Enactment .....16, 17

Rule 501.....17

Rule 802.....17

Rule 901(b)(10).....17

Rule 902(4) .....17

Rule 1101(e).....17

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIALS

113 Cong. Rec. (1967):

pp. 36,078-79 .....21

p. 36,409 .....21

114 Cong. Rec. (1968):

p. 12,293 .....22

p. 13,848 .....22

p. 14,133 .....22

p. 14,136 .....22

p. 14,173 .....20, 23

p. 14,184 .....20, 21, 22

p. 14,185 .....19, 20, 21, 23

p. 14,186 .....20

p. 16,066 .....23

p. 16,068 .....23

pp. 16,069-70 .....23

p. 16,276 .....23

H. Rep. No. 93-650, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 7075 (1973) .....12, 17

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

3A Norman J. Singer, Sutherland Statutes and Statutory Construction § 71:3 (rev. 6th ed. 2000) .....8

22 Charles Alan Wright, Federal Practice and Procedure (2d ed. 1982):

§ 5191.....17

§ 5198.....14, 17

Brief for the United States in *United States v. Payner*, No. 78-1729, *available at* 1979 WL 213843 (Nov. 30, 1979).....15, 16, 18

## ARGUMENT

### A. 18 U.S.C. § 3501(c) and the *McNabb-Mallory*[1] rule required suppression of Mr. Corley's confessions.

The government maintains that 18 U.S.C. § 3501 establishes voluntariness as the sole criterion for the admissibility of confessions, and that subsection (c) is nothing more than a voluntariness "safe harbor." Gov't Br. 7-8. It rejects the notion that subsection (c) retains a limited form of the *McNabb-Mallory* rule as resting on an unsustainable "negative implication" from the text; claims any surplusage occasioned by its own interpretation of § 3501 is tolerable; and argues that its rewriting of § 3501(c) to avoid that surplusage is minor and consistent with congressional intent. *Id.* at 8-9.

None of these contentions has merit. Congress's intent to preserve the *McNabb-Mallory* rule for confessions taken more than six hours after arrest is evident from § 3501(c)'s text, and need not be inferred by negative implication. Any other interpretation of § 3501 renders subsection (c) a nullity, a result the government can avoid only by rewriting subsection (c) in a way that fundamentally alters its text and meaning.

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[1] *McNabb v. United States*, 318 U.S. 332 (1943); *Mallory v. United States*, 354 U.S. 449 (1957).

### 1. Section 3501(c) retains the *McNabb-Mallory* rule outside the six-hour time limitation.

Mr. Corley does not argue, as the government suggests, that § 3501(c) creates a rule of inadmissibility simply by "negative implication." Gov't Br. 17-18. Rather, the text of subsection (c), when properly read in light of the existing *McNabb-Mallory* rule, establishes that Congress intended in § 3501(c) to preserve the rule in general, but to carve out from its application confessions made within six hours of arrest. Pet. Br. 24. Confessions made outside that six-hour time limitation are therefore inadmissible if, under the *McNabb-Mallory* rule, the defendant's presentment to the magistrate judge was unnecessarily delayed.[2]

As the government concedes, § 3501(c) was intended to address the *McNabb-Mallory* rule. Gov't Br. 8, 13. It must therefore be interpreted in light of that rule, not in a vacuum. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979). The *McNabb-Mallory* rule, as precisely captured by the text of subsection

[2] The six-hour "time limitation" in subsection (c) may be extended under the subsection's proviso to the extent found "reasonable" by the trial judge "considering the means of transportation and the distance to be traveled" to the nearest magistrate judge. 18 U.S.C. § 3501(c). Throughout this brief, all references to the time limitation are intended also to include any extensions allowed under the proviso.

(c), makes confessions "inadmissible solely because of delay in bringing such person before a magistrate judge." 18 U.S.C. § 3501(c). Subsection (c) then states that confessions "shall not" be "inadmissible solely because of delay" – *i.e.*, that the *McNabb-Mallory* rule shall not apply – if two conditions are met: "if such confession [was] . . . made voluntarily . . . *and* if such confession was made . . . within six hours immediately following his arrest." *Id.* (emphasis added).

The government simply ignores these conditions when it quotes § 3501(c) and claims that it is a "rule of inclusion." Gov't Br. 15-16. At most, subsection (c) is a *conditional* rule of inclusion, and given the backdrop *McNabb-Mallory* rule, that makes all the difference. Had Congress intended voluntariness to be the sole criterion for admissibility for purposes of subsection (c), it never would have added the six-hour provision. Indeed, that was how § 3501(c) read before it was amended on the Senate floor. Pet. Br. 39-40.

The very purpose of the time limitation, then, was statutorily to retain the *McNabb-Mallory* rule outside that time period. Thus, the addition of the six-hour provision – and its inclusion together with a separate criterion of voluntariness – is an affirmative, textual indication of Congress's intent to preserve a limited version of the *McNabb-Mallory* rule.[3] Section 3501(c) simply makes no sense without

[3] The government's point that Congress elsewhere has been clearer in adopting exclusionary rules, Gov't Br. 16, is misplaced

(Continued on following page)

the rule applying to confessions taken more than six hours after arrest.

Once it is understood that § 3501(c) does not create a rule of inadmissibility merely by negative implication, the government's objections fall away. There are no "untenable consequences" or "nonsensical results" in the form of delay being permitted only for transportation under § 3501(c)'s proviso. Gov't Br. 19-20. Once the six-hour time limitation has expired, the standard justifications for delay under the *McNabb-Mallory* rule continue to apply. Nor does Mr. Corley apply a negative-implication analysis "arbitrarily," *id.* at 20 – rather, he draws no negative implication at all. Finally, there is no "interpretive problem" for the courts, *id.*; they have been determining the reasonableness and necessity of delay under the *McNabb-Mallory* rule for sixty-five years. In doing so, the courts have been consistent and clear that delay for the purpose of interrogation, as occurred in this case, is the quintessential example of "unnecessary delay."[4]

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– none of the cited statutes involves a situation in which Congress was expressly addressing an *existing exclusionary rule*.

[4] *See, e.g.*, *Mallory*, 354 U.S. at 455 (delay in presentment "must not be of a nature to give opportunity for extraction of a confession"); *United States v. Wilson*, 838 F.2d 1081, 1085 (9th Cir. 1988) ("[D]esire of the officers to complete the interrogation is, perhaps, the most unreasonable excuse possible under § 3501(c).").

**2. Reading § 3501 to make voluntariness the sole criterion for the admissibility of confessions renders subsection (c) unacceptably superfluous.**

The government contends that § 3501(a) makes voluntariness "the sole test for the admissibility of confessions."[5] Gov't Br. 23. As demonstrated in Mr. Corley's opening brief, this interpretation renders subsection (c) entirely superfluous. Pet. Br. 28-30. The government's first response is to argue that "a degree of surplusage" in a statute may be tolerated in order to avoid adopting a "'textually dubious construction.'" Gov't Br. 22 (quoting *United States v. Atlantic Research Corp.*, 127 S. Ct. 2331, 2337 (2007)). But the government's interpretation does not merely render some terms "surplusage" in the sense of rendering them harmlessly redundant.[6] Instead, like the interpretation this Court rejected in *Atlantic Research Corp.*, it renders an entire provision –

[5] The government stops short of asserting that subsection (a) itself was intended to abrogate the *McNabb-Mallory* rule, but that is essentially the government's position. Such a contention is refuted by the legislative history, Pet. Br. 52-55, a point the government never addresses. "A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989). Given the legislative history, the government cannot possibly show that subsection (a) itself abrogates the *McNabb-Mallory* rule.

[6] *See, e.g.*, *Lamie v. Trustee*, 540 U.S. 526, 536 (2004) (reading word "attorney" in bankruptcy statute as harmless surplusage since statute's "reference to professional persons undoubtedly includes attorneys").

§ 3501(c) – "a dead letter" and "a nullity." 127 S. Ct. at 2337. The government's interpretation must therefore be rejected.

Furthermore, there is nothing "textually dubious" in construing § 3501(c) as retaining a limited *McNabb-Mallory* rule. To the contrary, as discussed above, it is the only plausible interpretation of the text in light of the backdrop against which Congress was legislating. Moreover, as this Court has explained, § 3501(a) was intended to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966). *See Dickerson v. United States*, 530 U.S. 428, 436 (2000). There is no basis in the text of subsection (a) to conclude that its general statement that "a confession shall be admissible . . . if it is voluntarily given" was intended also to overrule *McNabb* and *Mallory*, especially since subsection (c), by contrast, contains language specifically referring to the *McNabb-Mallory* rule.

### 3. The government's rewriting of § 3501(c) to avoid surplusage fundamentally changes the subsection from a provision addressing the *McNabb-Mallory* rule to a putative voluntariness safe harbor.

The government does not dispute that in order to avoid rendering § 3501(c) surplusage, it must rewrite

the subsection by substituting the word "involuntary" for "inadmissible" and adding the word "otherwise" before "voluntarily."[7] Gov't Br. 23. It is only through this rewriting that the government can characterize subsection (c) as a voluntariness safe harbor. Without the substitution and addition of words, subsections (a)-(b) and (c) relate to different things – (a) and (b) to voluntariness, and (c) to the *McNabb-Mallory* rule.

The government's insistence that its rewrite is minor and implied by the text is fundamentally incorrect. A side-by-side comparison of the statute as written by Congress, and as rewritten by the government, makes clear that the government's changes are significant and completely alter the statute's meaning:

| Subsection (c) | Government's rewrite |
|---|---|
| [A] confession . . . shall not be *inadmissible* solely because of delay [in presentment] . . . if such confession is found by the trial judge to have been made *voluntarily* and . . . if . . . made . . . within six hours [of arrest]. | [A] confession . . . shall not be *involuntary* solely because of delay [in presentment] . . . if such confession is found by the trial judge to have been made *otherwise voluntarily* and . . . if . . . made . . . within six hours [of arrest]. |

[7] The Third Circuit's interpretation of the statute required the same statutory rewriting: "Subsection (c) instructs courts that they may not find a confession involuntary 'solely' because of the length of presentment delay where the confession is *otherwise* voluntary and where the delay is less than six hours (or longer than six hours but explained by transportation difficulties)." J.A. 191.

"The short answer [to this argument] is that Congress did not write the statute that way." *Russello v. United States*, 464 U.S. 16, 23 (1983). Congress, having used the terms "inadmissible" and "voluntarily" in the same sentence, clearly understood that admissibility and voluntariness are distinct legal concepts. "The use of different words or terms within a statute demonstrates that the legislature intended to convey different meaning for those words." 3A Norman J. Singer, Sutherland Statutes and Statutory Construction § 71:3 (rev. 6th ed. 2000); *see also Russello*, 464 U.S. at 23 ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftmanship."). Likewise, courts "are not free, under the guise of construction, to amend [ ] statute[s] by inserting [words] therein." *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 199 (1952).

The government argues that "inadmissible" is "virtually synonymous" with "involuntary" by virtue of subsection (a)'s general provision that a confession "shall be admissible in evidence if it is voluntarily given." Gov't Br. 23. The text of subsection (c), however, precludes equating "inadmissible" and "involuntary." As discussed above, subsection (c) provides *two* criteria for the admissibility of a confession: "hav[ing] been made voluntarily *and* . . . within six hours" of arrest. 18 U.S.C. § 3501(c) (emphasis added); *see also* J.A. 234 (Sloviter, J., dissenting) ("[T]he majority completely overlooks the significance of the statutory

'and' in subsection (c)."). Because voluntariness is only one criterion for admissibility under subsection (c), "inadmissible" and "involuntary" are plainly not synonymous under the statute.

Under the *McNabb-Mallory* rule, moreover, "inadmissible" and "involuntary" are different concepts. *McNabb* and *Mallory* did not hold that delay rendered the confessions in those cases *involuntary*, but instead, that it rendered them *inadmissible*. *McNabb*, 318 U.S. at 340-42; *Mallory*, 354 U.S. at 455. The Court after *McNabb* made clear that the rule renders *voluntary* confessions inadmissible. *Upshaw v. United States*, 335 U.S. 410, 413 (1948); *see also Dickerson*, 530 U.S. at 442-44 (holding voluntary confessions inadmissible if taken in violation of *Miranda*). Congress thus chose the phrase "inadmissible solely because of delay" precisely because it refers to *McNabb-Mallory* rule. To change the term "inadmissible" to "involuntary," and to add the word "otherwise" before the word "voluntarily," eviscerates the reference to the *McNabb-Mallory* rule and replaces it with what the government would prefer to see in § 3501(c) – a voluntariness safe harbor. Because the government's rewriting of the statute fundamentally changes the meaning of subsection (c), it must be rejected.

**B. The government's interpretation of § 3501(c) either is constitutionally doubtful, or renders the subsection redundant of the voluntariness requirement and therefore superfluous.**

The government agrees that Congress "can neither direct the courts to admit confessions the courts find to be involuntary, nor accomplish the same thing by narrowing the factual grounds for determining involuntariness." Gov't Br. 38-39 (quoting Pet. Br. 36). Thus, the government concedes that its interpretation of § 3501(c) – as precluding a finding that a confession taken within six hours of arrest is *involuntary* (as opposed to merely inadmissible) due solely to delay, Gov't Br. 23 – would be unconstitutional if in fact it were to cause a court to admit a confession it otherwise would find involuntary.

To avoid this constitutional problem, the government posits that no confession made within six hours of arrest "could ever be deemed involuntary in a constitutional sense based 'solely' on the fact of the delay in presentment." Gov't Br. 39. But that solution, even if it were to alleviate the constitutional doubt, creates a separate problem: it interprets subsection (c) as applying to a null set of cases, and thus as being superfluous. If there is no conceivable case in which a court could validly determine a confession taken within six hours of arrest to be involuntary based solely on delay, then subsection (c) will never have any application under the government's interpretation – all voluntary confessions will be admissible

under subsection (a). While the government suggests this might be a permissible "belt-and-suspenders approach," Gov't Br. 9, its interpretation effectively reduces subsection (c) to a nullity, and therefore should be rejected.

### C. Federal Rule of Evidence 402 does not require admission of Mr. Corley's confessions.

The government argues that, to the extent the *McNabb-Mallory* rule as limited by § 3501(c) is a vestigial supervisory-power rule rather than a rule sanctioned by Congress, it is superseded by Federal Rule of Evidence 402. Gov't Br. 26-30. Under this theory (which was never raised or briefed below), Rule 402's general provision that all relevant evidence is admissible "eliminates *McNabb-Mallory* as an evidentiary doctrine," *id.* at 30, because this Court has no power to prescribe a supervisory rule inconsistent with an Act of Congress. *Id.* at 27-29.

The government's argument fails on two levels. First, even if it were true that Rule 402 abolished the Court's supervisory power to exclude evidence, the pertinent Advisory Committee Note on Rule 402 expressly provides that the *McNabb-Mallory* rule is an exception to Rule 402's general rule of admissibility. The government has previously conceded as much before this Court, and should not now be heard to argue otherwise. Second, Rule 402 in fact leaves the Court's supervisory power fully intact. The Rule's exception for "rules prescribed by the Supreme Court

pursuant to statutory authority" was intended not to limit the supervisory power, but to preclude future use of the then-extant Rules Enabling Acts to prescribe or amend rules of evidence. The Court has previously declined to credit the government's argument that Rule 402 abolished the supervisory power to exclude evidence, and it should not change course here.

### 1. Rule 402 preserves the *McNabb-Mallory* rule.

Rule 402 as originally proposed provided for the admissibility of relevant evidence "except as otherwise provided by," *inter alia*, an "Act of Congress" or "rules adopted by the Supreme Court." *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 216 (U.S. 1972). The Advisory Committee Note[8] on the proposed Rule sets forth several

[8] The Advisory Committee Notes on the Federal Rules of Evidence are an authoritative source for determining the meaning of the Rules, particularly where the rule in question became effective as proposed. *Tome v. United States*, 513 U.S. 150, 160-63 (1995) ("We have relied on those well-considered Notes as a useful guide in ascertaining the meaning of the Rules."). The Notes were transmitted along with the Rules to this Court prior to the promulgation of the Rules in November 1972, and to Congress prior to the enactment of the Rules in January 1975. H. Rep. No. 93-650, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 7075, 7077 (1973). While Rule 402 was amended between proposal and enactment, that amendment had no bearing on the issue of the *McNabb-Mallory* rule's preservation, as discussed in text.

exceptions to this general rule of admissibility. Advisory Committee Note on 1972 Proposed Rule 402 ("1972 Note"). One of those enumerated exceptions is the *McNabb-Mallory* rule. *Id.* The Advisory Committee explained that the *McNabb-Mallory* rule falls under Rule 402's exceptions for statute- and rule-based exclusion, because it implements and enforces the (originally statutory, now Rule of Criminal Procedure 5(a)-based) requirement of prompt presentment, and is in fact called for by § 3501(c):

> The Rules of . . . Criminal Procedure in some instances require the exclusion of relevant evidence. For example, * * * the effective enforcement of the command, originally statutory and now found in Rule 5(a) of the Rules of Criminal Procedure, that an arrested person be taken without unnecessary delay before a commissioner or other similar officer is held to require the exclusion of statements elicited during detention in violation thereof. *Mallory v. United States*, 354 U.S. 449 . . . (1957); 18 U.S.C. § 3501(c).

*Id.*

The Advisory Committee thus made clear that Rule 402's statute and rule exceptions were intended to cover not just statutes or rules that expressly exclude evidence, but also judicial rulings that enforce or implement statutes or statutorily-authorized

rules.[9] *Accord* 22 Charles Alan Wright, Federal Practice and Procedure § 5198 (2d ed. 1982) ("Often the exclusionary effect [for purposes of Rule 402] is explicit, but in some cases it is only implied."). And plainly, the Advisory Committee did not view Rule 402 as abrogating the *McNabb-Mallory* rule; the Committee drafted the Rule with the express intent to preserve it through the Rule's exceptions for statute- and rule-based exclusion.

The government has previously conceded before this Court that Rule 402 – as enacted – preserves the *McNabb-Mallory* rule. In its brief in *United States v. Payner*, 447 U.S. 727 (1980), the government acknowledged that the *McNabb-Mallory* rule falls within Rule 402's statute exception because it excludes evidence "as a method of implementing . . . a federal statute or a statutorily authorized rule":

> Rule 402 itself necessarily contemplates a substantial degree of judicial latitude in deciding whether relevant evidence should be suppressed in particular cases. The Rule stops far short of identifying specifically every set of circumstances in which suppression of relevant evidence is permissible or required. Rather, the drafters left to the courts the numerous difficult and often dispositive

[9] The government's point that *McNabb* itself recognized that Congress had not explicitly forbidden use of the evidence in that case therefore has no bearing under Rule 402. Gov't Br. 42 n.18.

> questions concerning the propriety of excluding relevant evidence *as a method of implementing the Constitution, a federal statute, or a statutorily authorized rule.*[FN13]
>
> [FN13] The Advisory Committee's Note to Rule 402 (56 F.R.D. at 216-218 (1972)) demonstrates that *the drafters expected the courts to decide when the effective enforcement of a particular constitutional provision, statute, or rule requires the suppression of relevant evidence*. *As examples of the kinds of judicial rulings the drafters intended to permit*, the Note cites *Mallory v. United States*, 354 U.S. 449 (1957) (implementing Fed. R. Crim. P. 5(a)'s prohibition of "unnecessary delay" between arrest and arraignment by suppressing a confession obtained during such delay). . . .

Brief for the United States in *United States v. Payner*, No. 78-1729, *available at* 1979 WL 213843, at *32 & n.13 (Nov. 30, 1979) (emphasis added).

But here, the government overlooks the Advisory Committee Note's dispositive impact, and never mentions the Note in its Rule 402 argument. Gov't Br. 26-30. It does cite the Note in a footnote elsewhere in its brief, and baldly states that the Note, in referring to the *McNabb-Mallory* rule, "does not purport to be an interpretation of [Rule 402] itself" but "simply

restates the conclusion of this Court in *Mallory*." Gov't Br. 42 n.18. That makes little sense. The relevant portion of the Note begins with the statement, "Not all relevant evidence is admissible," then proceeds to discuss various bases for exclusion, including the *McNabb-Mallory* rule. 1972 Note. The only plausible reading of the Note is the one the government gave it in *Payner*: the *McNabb-Mallory* rule is an "example[ ] of the kinds of judicial rulings the drafters intended to permit" under Rule 402. 1979 WL 213843, at *32 n.13.

**2. Rule 402 did not abolish the Court's supervisory power to exclude evidence.**

Although it never says so specifically, the government apparently relies on the language in Rule 402 providing an exception to the general rule of admissibility for rules prescribed by this Court "pursuant to statutory authority" to ground its claim that Rule 402 abolished the Court's supervisory power to exclude evidence. Gov't Br. 29. Again, even if the government were right in that regard, the *McNabb-Mallory* rule would still be preserved because – within the meaning of Rule 402 – the rule is based in statute and statutorily-authorized rule (§ 3501(c) and Rule 5(a)). But the government's abolition contention is wrong, too.

As discussed above, the original wording of Rule 402 made exception for "rules adopted by the Supreme Court." Advisory Committee Note on 1974

Enactment of Rule 402 ("1974 Note"). That wording was thought to create an ambiguity as to whether the then-extant Rules Enabling Acts gave this Court authority to promulgate rules of evidence, however, so Congress changed the language to the as-enacted "rules prescribed by the Supreme Court pursuant to statutory authority."[10] H. Rep. No. 93-650, *supra* n.8, at 7081, 7091. This change was made not only in Rule 402, but everywhere the objectionable language appeared in the Rules.[11] Given its narrow purpose, this pre-enactment amendment has been described by the leading commentator as non-substantive and "more symbolic than real." 22 Charles Alan Wright, Federal Practice and Procedure §§ 5191, 5198.

The use in Rule 402 of the words "pursuant to statutory authority" was therefore not intended to affect this Court's supervisory power, and the government has previously failed to persuade the Court

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[10] Specifically, Congress did not want to "acquiesce in the Court's judgment" that it had the authority to promulgate the Rules of Evidence, and did not want to sanction the use of the Rules Enabling Acts to amend or add to the Rules in the future. 1974 Note; H. Rep. No. 93-650, *supra* n.8, at 7081, 7091. Instead, Congress provided a new mechanism for future additions or amendments to the Rules in the statute creating the Rules of Evidence, a mechanism providing a greater role for Congress in the rule-making process. *See id.* at 7091.

[11] 1974 Note. Changes were thus made to promulgated Rules 501, 802, 901(b)(10), 902(4), and 1101(e), as well. *Compare* 56 F.R.D. at 230, 299, 332, 337, 348 *with* Fed. R. Evid. 501, 802, 901(b)(10), 902(4), 1101(e).

otherwise.[12] The government strenuously pressed the abolition argument in *Payner*, 1979 WL 213843, at *10-34, where the Court rejected it *sub silentio* – citing *McNabb* itself to reaffirm that "[f]ederal courts may use their supervisory power in some circumstances to exclude evidence taken from the defendant by 'willful disobedience of law.'"[13] 447 U.S. at 735 n.7 (quoting *McNabb*, 318 U.S. at 345) (italics omitted). While the Court reversed the suppression of evidence in that case on other grounds, 447 U.S. at 735-37, it emphasized that "our decision today does not limit the traditional scope of the supervisory power in any

[12] The argument was apparently first made to – and rejected by – the Second Circuit Court of Appeals in *United States v. Jacobs*, 547 F.2d 772, 777 (2d Cir. 1976), *cert. dismissed as improvidently granted*, 436 U.S. 31 (1978). The government next raised the issue in *United States v. Caceres*, 440 U.S. 741 (1979), where this Court declined to exercise its supervisory power to exclude evidence "without pausing to evaluate the Government's challenge to our power to do so." *Id.* at 755 & n.22. *Payner* was briefed and decided the following term. It appears that the abolition argument has lain dormant until its revival by the government in this case.

[13] The *Payner* majority's rejection of the Rule 402 argument was echoed, expressly, by the three dissenting Justices in that case. 447 U.S. at 751 n.17 (Marshall, J., dissenting) ("The Government argues that Rule 402 of the Federal Rules of Evidence stripped the federal judiciary of its supervisory powers to exclude evidence obtained through gross misconduct by agents of the United States. * * * The Court does not address the issue. I would merely note that the Government's discussion of the legislative history behind Rule 402 fails to convince me that it was Congress' intent to attempt such a radical curtailment of the long-established supervisory powers of the federal judiciary.").

way." *Id.* at 736 n.8. *Payner* therefore effectively disposes of the government's argument that Rule 402 abolished the Court's supervisory power to exclude evidence.

### D. The government fails to address the central elements of § 3501's legislative history.

Rarely does legislative history of the most persuasive type so clearly confirm a statute's meaning. Here, the floor manager of § 3501 laid bare the section's parallel structure by dividing its anti-*Miranda* and anti-*McNabb-Mallory* parts so they could be voted on separately; won retention of the *McNabb-Mallory* provision by promising to consider its subsequent amendment; and eventually agreed to that amendment, which represented – in his words – a "concession" on the original proposal of complete abrogation. 114 Cong. Rec. 14,185 (1968); Pet. Br. 46-49, 53-55. This is not "murky, ambiguous, and contradictory" legislative history susceptible to "strategic manipulations" by legislators or lobbyists. *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). Rather, it is clear confirmation – taken from the heart of the congressional debate – that § 3501(c) alone addresses the *McNabb-Mallory* rule, and retains it for confessions taken more than six hours after arrest.

The government addresses none of these central elements of the legislative history.[14] Instead, it misinterprets certain tangential remarks of Senator Scott while discounting his clear statement of his amendment's purpose; impugns reference to the D.C. Crime Act as "double legislative hearsay," Gov't Br. 10; and relies on legislative history of the type eschewed by the Court as unreliable in *Exxon Mobil* and other cases. The government's arguments are unpersuasive.

The government tries to downplay the Scott Amendment by citing Senator Scott's description of it as "simple," uncontroversial, and addressed to preserving § 3501(c)'s constitutionality. Gov't Br. 34; 114 Cong. Rec. 14,184, 14,185-86. This, the government maintains, shows that Senator Scott did not view his amendment as changing the "essential character of the bill." Gov't Br. 34. But the government fails to appreciate *how* the amendment addressed concerns over § 3501(c)'s constitutionality. In Senator Scott's own words, it did so by "provid[ing] that the period during which confessions may be received . . . shall in no case exceed 6 hours" – in other words, by restoring

[14] The government acknowledges Mr. Corley's "vote-structuring" argument, Gov't Br. 34, then promptly ignores it. And there is no acknowledgment, even, of the floor manager's view that the Scott Amendment represented a "concession" on complete abrogation – a mere "modification" of the *McNabb-Mallory* rule to which he could agree only after "adjust[ing his] own thinking" in light of the "differences of opinion about this matter." 114 Cong. Rec. 14,173, 14,185 (remarks of Sen. McClellan).

the *McNabb-Mallory* rule for confessions taken after that period.[15] 114 Cong. Rec. 14,184. The simplicity and agreeability of the Scott Amendment owed not to a failure to make any real change to proposed § 3501(c), but to the fact that essentially the same compromise on the *McNabb-Mallory* rule had been struck only five months earlier by the same Congress in the D.C. Crime Act – by a lopsided vote of 67-9 in the Senate and by unanimous consent in the House. 113 Cong. Rec. 36,078-79, 36,409 (1967).

The government's attempt to render the D.C. Crime Act irrelevant to the interpretation of § 3501(c) must fail. The government baldly states that the Act

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[15] The government disregards these remarks – made by Senator Scott in introducing his amendment – as having "no basis in the statutory text." Gov't Br. 35 n.16. But Senator Scott's statement of his amendment's meaning is entitled to substantial weight. *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976). The link between constitutionality concerns and the partial restoration of the *McNabb-Mallory* rule was made again by Senator Scott, immediately after Senator McClellan correctly described the amendment as a "concession" on complete abrogation:

> I am trying, here, to avoid having section 3501(c) . . . declared unconstitutional *by eliminating its open-endedness in its present form*. [The amendment] is a way out of this problem; but we could extend the time to a point where we endanger the likelihood of having it remain on the statute books. Therefore, [Senator McClellan] and I have agreed on a period twice as long as that which title III of the [D.C. Crime Act] stipulated for the District of Columbia.

114 Cong. Rec. 14,185 (emphasis added).

did not preserve the *McNabb-Mallory* rule for confessions taken more than three hours after arrest. Gov't Br. 35. Such a reading, however, is precluded not only by the Act's legislative history, Pet. Br. 43-44 & n.13, but by an even more important indicator for present purposes: the understanding of the senators debating § 3501(c).[16]

During debate on § 3501(c), Senator Bible – the floor manager of the D.C. Crime Act and a crafter of § 3501(c) – described the D.C. Act as taking only a "first step" toward abrogating the *McNabb-Mallory* rule in the District of Columbia. 114 Cong. Rec. 14,133. Senator McClellan explained that the D.C. Act only "revised" the rule, *id.* at 13,848, and Senator Fong noted that the Act "did not . . . repeal *Mallory* completely," *id*. at 12,293, 14,136. No senator remarked differently. It was under *that* understanding of the D.C. Crime Act that the Scott Amendment was proposed and agreed to as a "concession" on complete abrogation and a mere "modification" of the

[16] Normally, of course, little weight is given to the views of a later Congress on the interpretation of a prior Congress's enactments. *See, e.g.*, *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). But that maxim is inapplicable here. The issue is not what the D.C. Crime Act means, but what the Scott Amendment means. And given that the express purpose of the Scott Amendment was to "conform, as nearly as practicable," to the D.C. Act, 114 Cong. Rec. 14,184, senators' contemporaneous understanding of the D.C. Act is highly relevant. That understanding was likely highly accurate, as well, given that the D.C. Act was passed by the very same Congress debating § 3501(c).

*McNabb-Mallory* rule. *Id.* at 14,173, 14,185. Thus, even if resort to the legislative history of the D.C. Crime Act were inappropriate – which it is not – the government's claim that Mr. Corley's "compromise argument" depends entirely on that legislative history, Gov't Br. 35, is incorrect.

The government's only recourse in the legislative history is to the remarks of various representatives on the floor of the House after the bill had been returned to that chamber. Gov't Br. 37-38 & n.17. As discussed in Mr. Corley's opening brief, many of these remarks are ambiguous and contradictory, and all are from sources this Court has recognized as deserving relatively little weight.[17] Pet. Br. 50-51 & nn.19-20 (citing *Garcia v. United States*, 469 U.S. 70, 76 (1984); *Steiner v. Mitchell*, 350 U.S. 247, 254 (1956)). As such,

[17] Indeed, the remarks of Representative Celler, upon which the government principally relies, Gov't Br. 37, are particularly suspect. At least some representatives during the debate believed that Representative Celler (a staunch opponent of the bill) was engaged in a legislative maneuver that may have colored his remarks. 114 Cong. Rec. 16,069-70 (remarks of Rep. Colmer) (questioning Rep. Celler's request for referral to conference committee as a tactic to kill the bill); *id.* at 16,276 (remarks of Rep. Anderson) (same). This might well explain Representative Celler's inconsistent remarks regarding the effect of § 3501(c). *Compare id.* at 16,066 ("Title II would turn the clock backward to the day before *Mallory*. . . . ") *with id.* at 16,068 (§ 3501(c) provides a six-hour "time limit . . . during which interrogation may take place") (misattributed in government's brief, Gov't Br. 38 n.17). That is precisely the type of unreliable legislative history eschewed by the Court in *Exxon Mobil*, 545 U.S. at 568.

they cannot obscure the clear intent of Congress in enacting § 3501(c) as demonstrated by the persuasive legislative history that the government ignores.

Finally, it must be emphasized that the government's interpretation of § 3501 – that subsection (a) in effect abrogates the *McNabb-Mallory* rule and that subsection (c) is a voluntariness safe harbor – enjoys no support whatsoever in the legislative history. The government points to no instance in which a member of Congress spoke of subsection (a) and the *McNabb-Mallory* rule in the same breath, much less indicated that (a) eliminates the rule. Nor does the government muster even a single reference to subsection (c) as a voluntariness safe harbor. To the contrary, the legislative history conclusively demonstrates that subsections (a)-(b) and (c) are independent, parallel provisions and that (c) alone addresses the *McNabb-Mallory* rule by partially abrogating and partially retaining it. Pet. Br. 52-56.

### E. The government's policy arguments do not provide any basis for disregarding the text of § 3501 and its legislative history.

As the government correctly states, this case must be decided on the basis of statutory interpretation and not on the basis of policy. Gov't Br. 40. The policy considerations merit discussion, however, so that the consequences for the courts and law enforcement of an interpretation either retaining the

*McNabb-Mallory* rule as codified in § 3501(c), or eliminating it altogether, are understood.

Congress, in deciding not to abrogate the *McNabb-Mallory* rule entirely, but instead to enact a six-hour compromise that retains a limited form of the rule, wisely chose to maintain this critical protection against the exploitation of presentment delay to obtain a confession. The government argues that this interpretation of § 3501 "carv[es] a sizeable . . . exception" out of the general admissibility of voluntary confessions. Gov't Br. 22. But, inconsistently, the government also argues there is no need for the rule because there have been very few confessions excluded on this basis in recent years, and "no demonstrated pattern" of violations of the right to prompt presentment. *Id.* at 41.

Neither of the government's positions is correct. The Second Circuit, in two decisions nine years apart, took note of exactly such a pattern of Rule 5(a) violations, "specifically warn[ing] the government about its continuing practice of unnecessarily delaying arraignments," and noting that if the government's "'indifference to Rule 5(a)'" continued, it would "'lead to the future exclusion of evidence.'" *United States v. Fullwood*, 86 F.3d 27, 32 (2d Cir. 1996) (quoting *United States v. Colon*, 835 F.2d 27, 31 (2d Cir. 1987)). The court made a point in *Fullwood* "to reiterate our concern as to the apparent indifference on the part of some in the government to taking arrested persons before a magistrate judge 'without unnecessary delay.'" *Id*. The Second Circuit has not found it necessary to

repeat its admonition since *Fullwood*, suggesting that the court's second warning – coming from a circuit that applies the modified *McNabb-Mallory* rule[18] – has been largely effective. Without "carving a sizeable exception" out of the general admissibility of voluntary confessions, the Second Circuit has addressed a pattern of violations of the right to prompt presentment.

Mr. Corley's case illustrates well the indifference to Rule 5(a) that law enforcement may have in a circuit that does not apply the modified *McNabb-Mallory* rule. The FBI agents here flagrantly disregarded the six-hour time limitation, first by holding Mr. Corley for nearly four hours in a local police station while they apparently continued their investigation, and later by purposefully delaying Mr. Corley's presentment in order to obtain his two confessions. The total delay was over twenty-nine hours. Without the *McNabb-Mallory* rule as codified in § 3501(c), these and other agents would have no incentive to act any differently in future cases. Under the government's interpretation, so long as the confession is voluntary, it is admissible, and thus the six-hour time limitation does not establish a bright-line rule and serves no deterrent purpose. The right to prompt presentment, under the government's interpretation, exists on paper only. The "practice of

[18] *See United States v. Perez*, 733 F.2d 1026, 1035 (2d Cir. 1984) (holding that *McNabb-Mallory* rule applies outside § 3501(c)'s six-hour time limitation).

unnecessarily delaying" presentment that the Second Circuit twice observed, and that Mr. Corley's case illustrates, could then become increasingly common.

The government also states in passing that it "agrees with" the analysis of courts that have suggested that *Miranda* obviates the *McNabb-Mallory* rule, and that a defendant who is given *Miranda* warnings has no claim under *McNabb* and *Mallory* "on the theory that the *Miranda* warnings supply the words of caution that the Court found lacking in those cases." Gov't Br. 45 & n.20. The Court has already anticipated and rejected that argument in *Miranda*. 384 U.S. at 463 n.32 ("Our decision today does not indicate in any manner, of course, that these rules [Rule 5(a) and *McNabb-Mallory*] can be disregarded."). The government, moreover, never disputes that delay itself undercuts the value and effectiveness of *Miranda* by creating pressure to waive the *Miranda* rights. Pet. Br. 58-59.

The prompt presentment right protected by the *McNabb-Mallory* rule is broader than the rights guarded by *Miranda*. Most important, a defendant is not merely told of his right to counsel at the initial appearance; the Sixth Amendment right attaches and, if indigent, the defendant is immediately appointed (and may consult with) counsel. Fed. R. Crim. P. 5(d). In addition, the neutral magistrate reiterates the *Miranda* warnings in a non-coercive atmosphere, informs the defendant of the complaint and affidavit in support of the arrest, determines whether there is probable cause for the arrest, and addresses bail. *Id.*

Thus, a defendant's waiver of *Miranda* rights does not substitute for, and does not establish a knowing and intelligent waiver of, the right to prompt presentment. *See Moran v. Burbine*, 475 U.S. 412, 421 (1986) (to prove valid waiver of *Miranda* right, government must prove not only that waiver was voluntary, but also that defendant had "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.").[19]

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[19] The government cites five cases for the proposition that a valid waiver of *Miranda* rights bars any claim under *McNabb* or *Mallory*. Gov't Br. 45 n.20. But these cases are inapposite because they do not cite or address § 3501(c), and as a result they do not address the intent of Congress through that subsection to leave the *McNabb-Mallory* rule in place outside the six-hour time limitation. And in none of the cases was there unnecessary or unreasonable delay while the defendant was in federal custody; for that reason alone, the confessions were not excludable under the *McNabb-Mallory* rule and § 3501(c). *See United States v. Salamanca*, 990 F.2d 629, 633-34 (D.C. Cir. 1993) (delay not unreasonable given need to obtain interpreter); *United States v. Barlow*, 693 F.2d 954, 958 (6th Cir. 1982) (defendant in state, not federal, custody, and no evidence of collaborative arrangement with FBI agents, who were conducting independent investigation); *United States v. Indian Boy X*, 565 F.2d 585, 589 n.10 (9th Cir. 1977) (delay in presentment of juvenile caused only by need to file certificate under 18 U.S.C. § 5032 indicating that local county prosecutor refused to assume jurisdiction); *Pettyjohn v. United States*, 419 F.2d 651, 656 (D.C. Cir. 1969) (confessions not given during period of unnecessary delay); *O'Neal v. United States*, 411 F.2d 131, 136 (5th Cir. 1969) (delay not intentional, but instead necessitated by need to destroy illegal still, and by unavailability of magistrate).

The government also seeks, in a footnote, to distinguish *McNabb* and *Mallory* from Mr. Corley's case based on the fact that Mr. Corley's confessions concerned a different crime (bank robbery) than the one for which he was arrested (assault on a federal officer). Gov't Br. 46 n.21. The government suggests, without any case law support, that the *McNabb-Mallory* rule should be "offense specific," like the Sixth Amendment right to counsel. *See McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). But the *McNabb-Mallory* rule, as this Court repeatedly has made clear, was "'responsive to the same considerations of Fifth Amendment policy that . . . face[d] us . . . as to the states' in *Miranda*." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 348 (2006) (quoting *Miranda*, 384 U.S. at 436). Unlike the Sixth Amendment right to counsel, the Fifth Amendment right to counsel is not "offense specific." *McNeil*, 501 U.S. at 177. That is why, as the government acknowledges, Gov't Br. 45, *all questioning* must stop upon an invocation of rights under *Miranda*. Thus there is no doctrinal basis for treating the *McNabb-Mallory* rule as being limited to confessions regarding the offense of arrest.

In any event, the overriding concern of the Court in *McNabb* and *Mallory* was to prevent delay in presentment from being used as a means of extracting a confession. That concern is equally compelling, regardless of whether the confession is to the offense of arrest, or to a different offense. To interpret the rule as allowing delay in presentment, so long as it is for the purpose of extracting a confession about

offenses for which the defendant has *not* been arrested, would create an absurd loophole. Exploitation of delay for the purpose of securing *any* confession is the unlawful practice the *McNabb-Mallory* rule was intended to guard against. *Mallory*, 354 U.S. at 455 ("[T]he delay must not be of a nature to give opportunity for the extraction of a confession").[20]

The definition of "confession" in § 3501(e), moreover, does not suggest that the *McNabb-Mallory* rule is offense specific. Subsection (e) defines "confession" as meaning "*any* confession of guilt of *any* criminal offense. . . . " 18 U.S.C. § 3501(e) (emphasis added). Thus, given the purpose of the *McNabb-Mallory* rule and the definition of "confession" in § 3501, it is clear that the rule must apply equally to a case like Mr. Corley's, where officers arrest on one offense and

[20] The government's suggestion that suppression of Mr. Corley's confessions would be an "unwarranted windfall," Gov't Br. 46 n.21, is without merit. The government is correct that the FBI agents could have approached Mr. Corley after his initial appearance before a magistrate on the assault charge to seek waiver of his rights and question him regarding the bank robbery. *See McNeil*, 501 U.S. at 175. But Mr. Corley would have been much better informed of his legal rights at that point than he was before his appearance. Most importantly, he would have been appointed counsel, and would have had the opportunity to consult with that counsel. A neutral magistrate would also have determined if there was probable cause for the arrest, would have told Mr. Corley exactly what charges he was facing, and would have addressed the issue of release on bail. It is far from certain that Mr. Corley would then have freely waived his rights and spoken with FBI agents had they come to interview him following this initial appearance.

then delay presentment in order to obtain a confession on a separate offense.

## CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be reversed, Mr. Corley's oral and written confessions should be held inadmissible, and the case remanded to the Court of Appeals with instructions to remand to the district court for a new trial.

Respectfully submitted,

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